# Updated BIS Guidance Regarding the Treatment of Dual and Third Country Nationals with Respect to Deemed Reexports of Technology or Source Code Subject to the EAR

### I. <u>Background to Updated Guidance -- Export Control Reform EAR and ITAR</u> Harmonization Efforts

Part of the Administration's Export Control Reform (ECR) Initiative (see <a href="https://www.export.gov/ecr/">www.export.gov/ecr/</a>) is, insofar as possible, to harmonize terms, definitions, and concepts in and between the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). There rarely is a reason for separate regulatory structures and guidance documents with essentially the same objectives to use different terms, definitions, and concepts to accomplish those objectives. The EAR and the ITAR each control the export and reexport by U.S. and foreign persons of various types of goods, technology, software, and services to various destinations, end uses, and end users. They should not, therefore, compound compliance and interpretation difficulties by using different ways to describe the same control objectives. The harmonization efforts are also necessary to lay the groundwork for the potential consolidation and rationalization of the U.S. export control regulations, control lists, and interpretative guidance documents.

Many core EAR and ITAR terms and concepts were harmonized on October 15, 2013 -the effective date of the first transfers of jurisdiction to the EAR of military items that are
no longer identified on the ITAR's U.S. Munitions List. Other terms and phrases will be
harmonized over the course of 2014 as the departments publish amendments to the

remaining categories of military items. However, the Administration has not yet proposed any rules that would harmonize, in whole or in part, the treatment in the EAR and ITAR of the release outside the United States of controlled technology/technical data or source code, -i.e., "deemed reexports" -- to dual and third country nationals.

# II. <u>BIS Decision to Update Its Guidance Regarding the Treatment of Dual and</u> Third Country Nationals to Include the ITAR's Treatment of such Nationals

BIS has concluded that an unintended consequence of changing the jurisdiction over military items before harmonizing the Commerce Department and State Department treatments of dual and third country nationals is that the BIS policy in place prior to this revision would impose individual licensing obligations on certain deemed reexports that did not exist for the same items in the same circumstances when they were subject to the ITAR. Such an outcome would violate a general principle of the reform effort, which is not to impose, unintentionally, more restrictive controls for items subject to the EAR than those that exist for the same items when they were subject to the ITAR, in the same circumstances.

For these reasons and as described below, BIS has decided to update its guidance on the subject so that one may use either the current BIS deemed reexport guidance *or* the comparable ITAR rules or State Department guidance for determining when an individual BIS license or other EAR authorization, such as the application of a license exception, is needed to release technology or source code subject to the EAR outside the United States to a dual or third country national. That is, if an additional authorization would not be required under the ITAR or State Department guidance to

release ITAR-controlled technical data outside the United States to a dual or third country national, then an additional EAR authorization is not required to release 600 series or any other technology or source code subject to the EAR to the same dual or third country national in the same situation.

# III. <u>Existing Regulations in the EAR and Guidance from BIS regarding Deemed Reexports</u>

EAR section 734.2(b)(5) states that "[a]ny release of technology or source code subject to the EAR to a foreign national of another country is a deemed reexport to the home country or countries of the foreign national. However, this deemed reexport definition does not apply to persons lawfully admitted for permanent residence." Based on its May 31, 2006 Federal Register notice, BIS interpreted this provision to mean that deemed reexport licensing requirements are based on a foreign national's most recent country of citizenship or permanent residency. See, e.g., 71 FR 30840, 30843 (May 31, 2006). BIS also indicated that this approach would be applied in a flexible manner to address "concerns that may arise in instances where a foreign national maintains dual citizenship or multiple permanent residence relationships." *Id.* For example, BIS has taken the position that if the status of a foreign national is not certain, the reexporter should consult BIS for guidance regarding whether a deemed reexport license is required. BIS will assist such reexporters in determining where the stronger ties lie. based on the specific case. BIS would review the foreign national's country, family, professional, financial, and employment ties. *Id.* Similarly, BIS has indicated in its website guidance that the "most recent country" approach reflects a "general policy" or "principle" ("Deemed Export" FAQs, Answers to Questions 6 and 11), not the dispositive criterion for determining the home country or countries of a foreign national for purposes of section 734.2(b)(5) of the EAR. This history gives BIS the flexibility to make the updates described below that are warranted because of the recent amendments to the EAR involving the jurisdictional transfer to the EAR of formerly ITAR-controlled items.

BIS is retaining this flexibility and will continue to exercise its discretion to consider requests for advisory opinions regarding whether releases of technology or source code in fact patterns not described in this guidance document would require a license from BIS.

# IV. <u>Deemed Reexport Regulations and Guidance in the ITAR and from the Directorate of Defense Trade Controls (DDTC)</u>

ITAR section 124.16 is, *inter alia*, a special retransfer authorization for the release of unclassified technical data to nationals of member states of NATO, the European Union, Australia, Japan, New Zealand, and Switzerland. ITAR section 126.18 is an exemption regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual or third-country nationals. They can be reviewed at: <a href="http://www.pmddtc.state.gov/regulations\_laws/itar.html">http://www.pmddtc.state.gov/regulations\_laws/itar.html</a>. The State Department has also entered into several country-specific agreements regarding the reexport of ITAR controlled technology to dual and third country nationals. These are described in more detail below.

As described above, if the ITAR would permit the release of ITAR-controlled technical data, which includes software, to a dual or third country national outside the United States (*i.e.*, a "deemed reexport") without an individual license in a particular situation,

BIS' policy is to not require an individual license under the EAR to release technology or source code subject to the EAR outside the United States in the same situation. It would not, however, make sense to repeat the relevant ITAR provisions word-for-word in this BIS guidance because the ITAR provisions, guidance, and exchanges of letters use many ITAR-specific terms and also address issues not directly related to the release outside the United States of technology or source code to dual and third country nationals. Thus, BIS has, in the next section of this document, combined its existing dual and third country national regulations and guidance with those of the comparable provisions and principles of the ITAR's dual and third country national regulations, guidance, and country-specific agreements. To make the collection of various policies from different primary sources easier to read, BIS has put them in an outline format using EAR-specific terminology.

V. <u>Updated BIS Guidance Regarding When a Person or Entity Outside the United States May Release, without a License or other EAR Authorization, Technology or Source Code Subject to the EAR to a Foreign Person who is a Dual or Third Country National</u>

In the absence of a license issued by BIS or the application of an EAR license exception, you (e.g., an entity outside the United States) may release (i.e., reexport) outside the United States technology or source code that would otherwise require such a license or license exception to a dual or third country national if any of three situations is applicable – the reexport is within the scope of (A) legacy BIS guidance, (B) the ITAR's provisions in section 124.16 in effect on the publication date of this guidance, or (C) the ITAR's provisions in section 126.18, including country-specific agreements

based on section 126.18, or relevant DDTC guidance in effect on the publication date of this guidance.

# A. Legacy BIS Dual and Third Country National Reexport Guidance In general, you (e.g., an entity outside the United States) may reexport technology or source code subject to the EAR outside the United States to a dual or third country national without an additional license issued by BIS or the application of an EAR license exception if:

- You are authorized to receive the technology or source code at issue, whether by an individual license, license exception, or situations where no license is required under the EAR for such technology or source code; <u>and</u>
- You are certain that the foreign national's most recent country of citizenship or permanent residency is either:
  - the same as yours (e.g., the same country in which your company outside the United States is located), <u>or</u>
  - ii. that of a country to which export from the United States of the technology or source code at issue would be authorized by the EAR either under a license exception, or in situations where no license under the EAR would be required.

If you are uncertain of the foreign national's most recent country of citizenship or permanent residency and none of the other guidance from the provisions and guidance described below is applicable, you should

seek guidance from BIS regarding whether a license or other authorization is required under the EAR to release technology or source code subject to the EAR to the dual or third country national.

A BIS license authorizing the release of technology to an entity also authorizes the release of the same technology to the entity's dual and third country nationals who are permanent and regular employees of the entity's facility or facilities authorized on the license, except to the extent a license condition limits or prohibits the release of the technology to nationals of specific countries or country groups.

### B. <u>Updated BIS Dual and Third Country National Guidance Consistent</u> with ITAR Section 124.16

In general, you (e.g., an entity outside the United States) may release technology or source code subject to the EAR to a dual or third country national without an additional BIS license issued or the application of an EAR license exception if:

- You are authorized to receive the technology or source code at issue, whether by an individual license, license exception, or through situations where no license is required under the EAR;
- 2. The dual or third country national is a *bona fide* regular and permanent employee directly employed by you;

 Such employee is a national exclusively of countries that are member states of NATO or the European Union, Australia, Japan, New Zealand, or Switzerland; <u>and</u>

 The release of technology or source code takes place completely within the physical territory of any such country.

## C. <u>Updated BIS Dual and Third Country National Guidance Consistent</u> <u>with ITAR Section 126.18</u>

In general, you (e.g., an entity outside the United States) may release technology or source code subject to the EAR to a dual or third country national without an additional BIS license issued or the application of an EAR license exception if:

- You are authorized to receive the technology or source code at issue, whether by an individual license, license exception, or situations where no license is required under the EAR;
- 2. The dual or third country national is a *bona fide* regular and permanent employee directly employed by you;
- The release takes place completely within the physical territory of the country where you are located, conduct official business, or operate;
- You have effective procedures to prevent diversion to destinations, entities, end users, and end uses contrary to the EAR; <u>and</u>
- 5. Any one of the following six (*i.e.*, a, b, c, d, e, or f) situations is applicable:

 a. the dual or third country national has a security clearance approved by the host nation government of the entity outside the United States;

- b. the entity outside the United States:
  - has in place a process to screen the employee and to have the employee execute a non-disclosure agreement that provides assurances that the employee will not disclose, transfer, or reexport controlled technology contrary to the EAR or without an authorization issued by BIS;
  - ii. screens the employee for substantive contacts with countries listed in Country Group D:5;
  - iii. maintains a technology security or clearance plan that includes procedures for screening employees for such substantive contacts;
  - iv. maintains records of such screenings for the longer of five years or the duration of the individual's employment with the entity; <u>and</u>
  - will make such plans and records available to BIS or its agents for civil and criminal law enforcement purposes upon request;
- the entity is a UK entity implementing ITAR section 126.18
   pursuant to the US-UK Exchange of Notes regarding ITAR

section 126.18 for which the UK has provided appropriate implementation guidance, which can be found at:

<a href="http://www.bis.gov.uk/assets/biscore/eco/docs/itar-rule-change/11-1337-question-and-answer-matrix-itar-rule-change.doc;">http://www.bis.gov.uk/assets/biscore/eco/docs/itar-rule-change/11-1337-question-and-answer-matrix-itar-rule-change.doc;</a>

- d. the entity is a Canadian entity implementing ITAR section 126.18 pursuant to the US-Canadian Exchange of Letters regarding ITAR section 126.18 for which Canada has provided appropriate implementation guidance, which can be found at: <a href="http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/bulletins/bulletin3-eng.html">http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/bulletins/bulletin3-eng.html</a>;
- e. the entity is an Australian entity implementing the exemption at paragraph 3.7b of the ITAR Agreements Guidelines; <u>or</u>
- f. the entity is a Dutch entity implementing the exemption at paragraph 3.7c of the ITAR Agreements Guidelines.

### D. <u>Definitions</u>

1. <u>"Substantive contacts,"</u> in this context, has the same meaning as it has in ITAR section 126.18, which is that it includes regular travel to countries in Country Group D:5; recent or continuing contact with agents, brokers, and nationals of such countries; continued demonstrated allegiance to such countries; maintenance of business relationships with persons from such countries; maintenance of a residence in such countries; receiving salary or

other continuing monetary compensation from such countries; or acts otherwise indicating a risk of diversion. Although nationality does not, in and of itself, prohibit access to technology or source code subject to the EAR, an employee who has substantive contacts with persons from countries listed in Country Group D:5 shall be presumed to raise a risk of diversion, unless BIS determines otherwise.

- 2. The phrase <u>"permanent and regular employee"</u> is a combination of BIS's definition of "permanent employee," as set forth in its November 19, 2007 advisory opinion, and the ITAR's definition of "regular employee" in section 120.39, and is an individual who
  - is permanently (i.e., for not less than a year) and directly
     employed by an entity, or
  - b. is a contract employee who:
    - is in a long-term contractual relationship with the company where the individual works at the entity's facilities or at locations assigned by the entity (such as a remote site or on travel);
    - ii. works under the entity's direction and control such that the company is responsible for determining the individual's work schedule and duties,
    - iii. works full time and exclusively for the entity, and

iv. executes a nondisclosure certification for the company that he or she will not disclose confidential information received as part of his or her work for the entity.

Note: If the contract employee has been seconded to the entity by a staffing agency, then the staffing agency must not have any role in the work the individual performs other than to provide the individual for that work. The staffing agency also must not have access to any controlled technology or source code other than that authorized by the applicable regulations or a license.

For more information on deemed exports, please click here to review the <u>Deemed</u>

Export Frequently Asked Questions on the BIS website.